The City of New York

POLICE DEPARTMENT

July 21, 2008

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant Anthony Raganella
Tax Registry No. 916508
Patrol Borough Brooklyn North Task Force
Disciplinary Case No. 83140/07

The above-named member of the Department appeared before me on May 13, 2008, charged with the following:

1. Said Lieutenant Anthony Raganella, assigned to the 79th Precinct, on or about June 21, 2006, while off-duty, at or near 26 Washington Street, New York, New York, did wrongfully engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Lieutenant wrongfully copied and removed questions from a post-captain's exam protest session.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT-PROHIBITED CONDUCT GENERAL REGULATIONS

2. Said Lieutenant Anthony Raganella, assigned to the 79th Precinct, on or about July 20, 2006 while off-duty, did wrongfully engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Lieutenant wrongfully posted his protest to a captain's exam, administered by the Department of Citywide Administrative Services, on a publicly accessible internet site, when said protest contained verbatim questions and answers to said captain's exam. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT-PROHIBITED CONDUCT GENERAL REGULATIONS

3. Said Lieutenant Anthony Raganella, assigned to the 79th Precinct, on or about August 8, 2006, while off-duty, after receiving an allegation of corruption or serious misconduct against himself, failed to promptly notify the Department, a Supervising Officer or a Desk Officer of said allegation; to wit: that said Lieutenant failed to promptly notify the Department, a Supervising Officer or a Desk Officer that he was

being investigated by the Department of Investigation for improper conduct regarding said Lieutenant's captain's exam protest. (*As amended*)

P.G. 207-21, Page 1, Paragraph 1 - ALLEGATIONS OF CORRUPTION AND SERIOUS MISCONDUCT AGAINST MOS

P.G. 212-09, Page 1, Paragraphs 1 & 2 - COMMAND OPERATIONS UNUSUAL OCCURRENCE REPORTS

The Department was represented by Stephen Bonfa, Esq., Department Advocate's Office, and the Respondent was represented by James Moschella, Esq. and James Brown, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty of Specification No. 2 and Not Guilty of Specification No. 3. Specification No. 1 is dismissed.

Overview of the Facts

The facts of this case are essentially not in dispute. The Respondent took captain's examination number 5535. His score was an 85. A letter, dated June 2, 2006, was sent to him by the Department of Citywide Administrative Services (DCAS) advising him of a "protest session" to be held on June 21, 2006 (DX 2). The letter also advised him that, "...in no case will you be allowed to remove from our premises any materials relating to the test, or any notes which you may make during the review." At the session he signed the letter (DX 2a).

At the session he received a document called a "Cover Sheet" which contained instructions for the protest (DX 3). Item 4, which is all in upper case type, reads:

> You must turn in all of the examination material, your protest, your scrap paper, the proposed answer key and any notes you may have prepared. Pursuant to New York Civil Service Law Section 50.11 (d), A person who shall have in his or her possession any questions or answers relating to any such examination, or copies of such questions or answers, unless such possession is duly authorized by the appropriate authorities shall be guilty of a class A misdemeanor punishable by a sentence of imprisonment of six months or a fine of one thousand dollars, or both. Additionally, a person who is found to have violated this section shall be disqualified from appointment to the position for which the examination is being held and may be disqualified from being a candidate from any civil service examination for a period of five years.

Item 7 of the "Cover Sheet" is headed: "Preparation of Protest" and states:

> Put the number of the question in the left margin of the ruled paper. State the question and explain why the answer selected by you is as good as or better than the proposed answer key and any additional evidence you wish to submit in support of such statement.

Item 2 allows six hours for the protest at the location; however, item 8 provides for a mail-in response, and allows 30 calendar days.

The Respondent asked a monitor if the rules for preparation of the protest (Item 7) applied the same to both protests done on the premises or mail-in protests and was told they do.

The Respondent determined to challenge three of the 15 questions he was marked wrong on, wrote the questions verbatim in a reference book he had with him, turned in his other materials and left the protest session after about two hours. Then after working on the questions for almost a month he submitted his protest in writing.

When DCAS received the protest they noticed that the questions were recited verbatim. They asked the Department of Investigation (DOI) to look into the matter.

Investigator Befort from DOI called the Respondent in for an interview on August 8, 2006. He spoke to his attorney on the telephone and determined that he did not need him to be present. He was sworn in and gave a statement which was tape recorded. There is no dispute that he set forth exactly what he did. He even added, apparently without being asked, that he had posted the exact questions, and the reasoning of his protest, on a publicly accessible website on July 20, 2006 (see DX 4).

Befort reported his findings to DCAS he also notified the Internal Affairs Bureau (IAB). Assistant Commissioner Thomas J. Patitucci of DCAS sent a letter, dated December 8, 2006, to the Respondent (DX 1) entitled: "Notice of Allegation of Violation of Section 50(11)(d) and (g) of the New York State Civil Service Law." In the preliminary findings section of that letter the Respondent was told that he had violated subdivision (11) (d) in that he had in his possession questions and answers in relation to the examination. He was also advised that he violated subdivision (g) because: "you disclosed to persons the questions to Exam No. 5535 while Exam No. 5535 was continuing to be administered to candidates." In a letter marked "Attachment A" he was advised that DCAS must continue to administer Exam No. 5535 to candidates who were unavailable to take the examination when administered on May 20, 2006 for reasons such as absence due to ordered military duty. The Respondent was advised that he would be disqualified under examination number 5535 and that these violations warranted his disqualification from being a candidate from future civil service examinations.

The Respondent wrote a detailed response (RX A) in which he set forth his defense and apologized for any inconvenience regarding the test. He also provided background information about himself and complained that the penalty was too harsh, noting that his adjusted score on the test was 87.518 and that he was 13 on the list.

The final penalty imposed by DCAS was the disqualification under examination number 5535 and not a permanent bar from civil service examinations.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Thomas Patitucci, Lyndon Williams, Matthew Befort, and Sergeant David Gomes as witnesses.

Thomas Patitucci

Patitucci is Assistant Commissioner for Examinations at DCAS. He indicated that the protest for captain's exam 5535 was held on June 21, 2006. He noted that candidates are not permitted to leave with test materials or written notes because the questions are used again in future examinations. He explained how questions are drawn up over a period of months using experts from this Department and DCAS and that the questions are further reviewed by a second panel before they are printed into a test book.

After his staff made him aware that the Respondent may have removed questions from the protest he had the staff report that to the Inspector General. A determination was made that the Respondent did in fact remove three questions and posted them on a website. Patitucci explained that make-up exams have to be given for individuals who miss the test because of military service or line of duty injury. As a result when he

learned what the Respondent had done, they had to remove the three questions from the make-up examination. A letter was sent to the Respondent dated December 8, 2006 (DX 1).

Patitucci agreed that there are no rules or regulations that prohibit the posting of parapharased questions and answers from the examination. He indicated that this was because, "I have no control over what our candidates do after they leave the test session. Even if we created a rule for that, it would be unenforceable."

On cross-examination Patitucci agreed that those who wish to protest may formulate their protest either at the actual session or may do it from home within thirty days. He indicated that individuals submitting protests must "in some way" indicate the question that they are protesting. Patitucci indicated that he did not interpret the instruction to "state the question" to mean that individuals would have to write out the "actual" question they are protesting. He agreed that the protester would have to indicate the question number.

Patitucci then indicated that the same rules stated in Item 7 would not apply stating, "There are some things that cannot be done from home. Common sense dictates that." He agreed that there was nothing in the instructions which indicated that.

Patitucci agreed that he had a role in drafting the notice of allegations (DX 1) and he had a role in determining the appropriate penalty. He indicated that the range of penalties could be to bar the person for life from civil service examinations or to bar the person for five years or to nullify the test scores for the person. He agreed that DCAS did not impose the harsher penalties but nullified the Respondent's test results for this particular test and that in this situation it was the most lenient penalty that could be

imposed. He said that they did this because of mitigating factors such as the Respondent's service record, his performance as a lieutenant and his performance as a member of NYPD.

Patitucci indicated that there were more lenient penalties that could have been imposed such as pass the Respondent over on the eligibility list a couple of times and not appoint him early. He also indicated that he did not take into consideration the Respondent's cooperation with his agency in this matter in formulating penalty.

Patitucci agreed that there were no regulations that in any way restricted civil servants from talking between and among themselves after an examination is administered with regard to the contents.

He indicated that he was only vaguely familiar with the website ExamX (where the questions were posted). Patitucci was not aware of any effort by his agency to shut down the website nor were there any efforts to limit or to preclude city employees from accessing that website.

He agreed that there are no rules or regulations limiting employees from talking about examinations because they would be impossible to enforce. He agreed that the same would probably apply to the website.

Patitucci indicated that he had seen the website once and that he saw discussions of questions and the content of questions. He was not aware of any effort by DCAS to identify individuals who posted civil service questions on the ExamX website.

Patitucci examined Specification No. 1 and agreed that it set forth a violation of the Civil Service Law and DCAS rules and that DCAS has the process with which to charge individuals with violations of the Civil Service Law and those DCAS rules. He

agreed that that process commenced with the Notice of Allegations of Violation as in DX 1. He further agreed that DCAS on behalf of the City of New York determined whether there had been misconduct warranting a penalty.

On re-direct examination Patitucci indicated that in the protest the question and answer need not be stated verbatim and that the rule is the same in the protest session as well as for the mail-in.

On questioning by the Court, Patitucci indicated that a misstatement of the question on protest would not affect the quality of the protest adding that "just as long as we understand what question the individual is talking about."

Lyndon Williams

Williams is an Associate Staff Analyst with DCAS. He is involved in the administration of tests for civil service positions. He explained how a test taker can request to participate in a protest after the test is scored. He explained that a letter is sent which instructs the candidate of the date of the protest and what they can take with them. He identified DX 2 as their standard letter. He also explained what the letter tells candidates about what they can bring and that they cannot "leave the room with any documentation, any notes they made of the protest. All notes even up to scrap paper that is used must be turned in." At the protest location they sign the letter (DX 2a).

In the room there are other candidates who are there to protest. They are given the test materials used at the test site; that is reference booklets, memory booklets, whatever documentation were used to administer the test. They are also given the paper on which to make the protest. There is also a cover sheet which he identified as DX 3.

He indicated that the candidate could indicate that he or she did not wish to protest at that time. That candidate, he said, would have to turn in all materials to the monitor. Williams indicated that if the candidate made any notes those notes would be taken because they are instructed not to leave the room with any notes.

Williams indicated that monitors are trained to answer basic questions that a candidate might ask. He indicated that for instance they will tell them not to take any paper, scrap paper or test booklets. They would instruct candidates not to take test booklets apart. He noted that the only thing they leave with is the letter that they came in with.

Williams noted that they are encouraged to ask questions and the monitors, on the days he is in charge, would get him to answer questions that were asked. He agreed that not all questions go to him as the monitors can answer basic questions.

Williams indicated that "we would not encourage" monitors to answer a question such as whether the rules are the same for protests done at the protest center as for those for mail-in protest.

There was no cross-examination of this witness.

Matthew Befort

Befort is a Confidential Investigator with DOI. He indicated that his office was contacted by DCAS. He contacted the Respondent by telephone and said he wanted to speak to him about the protest he submitted to DCAS and he set up a meeting that occurred on August 8, 2006. Prior to the interview they told him why he was there. They gave him an opportunity to contact a union representative if he wanted to. Expanding on what he told him about the reason for the interview Befort said that he, his boss and

another investigator, "informed him that DCAS had contacted us about three protest questions that he had mailed to DCAS and that there were concerns that he may have removed exam materials and so we wanted to talk to him about that, explore those concerns."

Befort noted that the Respondent was open to speaking with them. He noted that after telling him the reason for the interview they stepped out of the room and gave him an opportunity to contact an attorney or union representative. When he was finished the Respondent opened the door and said it was okay to proceed. They then swore him in. Befort testified that the Respondent was cooperative with them the entire time. After the interview they referred the factual findings to DCAS.

The finding were that the Respondent went to the protest session with exam booklets and materials and that he did not submit his protest that day but chose to write down the three questions in one of his booklets that he brought with him. He proceeded to leave the DCAS session and later mailed his protest in to DCAS.

Befort also looked at the ExamX website and identified DX 4 as reflecting what was there. He noted that DX 4 indicates that the materials were posted on July 20, 2006. He indicated that the questions were word for word from the examination and that the Respondent's protest was also word for word on the website.

Befort described ExamX as a discussion board for police related exams where people who are going to or have taken examinations can discuss topics related to the examinations.

He noted that other postings on the website had general information about the exams and that the information was varied. He found other postings discussing questions

on the examinations but none that had the exact questions the way the Respondent's posting did.

Befort indicated that IAB was notified and documents were turned over to them in October 2006. No further investigation was done by DOI.

On cross-examination Befort acknowledged that he did not know about the ExamX website before August 8, 2006 and that during the interview, on that day, the Respondent volunteered that he had posted the questions on it. Befort agreed that the Respondent had been very candid with him during the interview.

Befort agreed that after the interview he visited the website and that the only posting that had questions and answers verbatim was by the Respondent. Befort agreed that to his understanding there were no rules prohibiting candidates from "chattering" with one another with regard to their particular protest review sessions. He did not know if candidates were allowed to talk with each other during the protest session itself.

Befort agreed that he never attempted to identify others who had postings on the website discussing questions and answers. ExamX was the website he visited in regard to this investigation. He agreed that DOI did not initiate the investigation and that DCAS provided the information. He also agreed that DCAS was the ultimate decision maker with regard to what would happen with the Respondent and that DOI was gathering facts for DCAS.

Befort did not recall offering to go to the precinct to conduct the interview with the Respondent there. He agreed that the Respondent came alone to the examination. He agreed that prior to starting the tape he told the Respondent how DOI came to be interviewing him. He told the Respondent that the matter had come to DOI from DCAS

and that DCAS had noticed that the questions and answers had been written word for word on the protest. He also agreed that he told the Respondent that DCAS wanted DOI to find out how this happened. He also agreed that he told the Respondent that he was not the ultimate decision maker and that he would refer his findings to DCAS for them to decide what action to take if any.

Befort agreed that once the Respondent was sworn in he made a full statement, never denied anything and explained why he did it. Befort agreed that the Respondent told him that he had gone to a proctor at the protest and asked if the instructions applied to both the take-home protest and the one completed in the protest room. Befort also agreed that the Respondent had said that the proctor said "yes."

Befort also acknowledged that during the interview he had agreed with the Respondent's assertion that the instructions could be subject to misinterpretation.

Befort agreed that he had reviewed the Respondent's protest and that he compared it to the actual test and that the protest was word-for-word what was on the actual test. He also agreed that the people from DCAS who brought this matter to their attention were surprised as they had never seen a word-for-word protest.

Sergeant David Gomes

Gomes is an investigator assigned to IAB group 31. He received the case involving the Respondent on October 17, 2006. His investigation mirrored that of DOI. They conferred with the investigators who turned over a copy of the tape of the interview with the Respondent and they conducted their own interview of him. Gomes was not present at that interview which was conducted by his supervisor Lt. Charles Francis. He indicated that their conclusion was the same as that of DOI.

On cross-examination, Gomes agreed that their investigation essentially involved collection information from DCAS and DOI. He acknowledged that they were waiting to see what those agencies were going to do with the Respondent and then they were going to forward the matter to the Department Advocate's Office.

He recalled receiving the Notice of Allegation (DX 1) from DCAS. He reviewed his folder and indicated that that letter dated December 8, 2006 was the first communication from DCAS to the Respondent advising him that he was the subject of an allegation.

Gomes agreed that once they found out that DCAS had penalized the Respondent by disqualifying him on the examination they closed their case and forwarded it to the Department Advocate's Office. He agreed that the determination to go forward with charges and specifications was made in the Department Advocate's Office and that he never found any violation of the Patrol Guide. He also agreed that the Respondent's testimony at the Official Department Interview was consistent with the statement he made to DOI.

The Respondent's Case

The Respondent called Deputy Chief Philip Banks as a witness and the Respondent testified in his own behalf.

Deputy Chief Philip Banks

Banks stated that he is the executive officer of the Patrol Borough Manhattan South. He has been a deputy chief for approximately 17 months, and in July, will have completed 22 years with the Department.

Banks stated that he has known the Respondent for about six or seven years. Banks had been the commanding officer of the 81 Precinct when he first met the Respondent, who had been newly promoted to lieutenant. As the commanding officer, Banks personally supervised the Respondent.

Banks noted that he has also spoken with other supervisory officers who have worked over the Respondent. Numerous times during the six years, Banks has discussed the Respondent and his reputation with those other supervisors. Numerous times when he worked with the Respondent, Banks has specifically discussed the Respondent's reputation for integrity and honesty.

Banks stated that the Respondent's reputation for integrity and honesty in the Department is excellent, "non-questionable." The Respondent had worked for Banks in two commands, the 81 and 79 Precincts, and Banks stated: "quite frankly he probably was the best supervisor that I ever worked with. I never had a reason to question his integrity nor his work ethic." He spoke highly of the Respondent's work ethic and stated that he served Banks and the community of Bedford-Stuyvesant well. Banks further stated: "He did a fantastic job for the command and I was very appreciative of it."

Banks stated that during the time he worked with the Respondent, Banks has had at least 2 or 3 executive officers who worked for him. According to Banks, these executive officers are now commanding officers or have been commanding officers, and the Respondent "was at the top of their list and that was an independent observation that they all had," in terms of integrity and work ethic.

In terms of the Respondent's reputation for thoroughness and being a thorough supervisor, Banks stated: "If I had to critique [the Respondent], he could be a little bit, a

little bit too over the top when it comes to dotting his I's and crossing his T's." Banks related that one time during a commanding officer's meeting, he questioned something the Respondent was doing and the Respondent stated that this is what Banks himself said. Banks thought he had said something different, but the Respondent produced minutes of that meeting to the contrary. Besides commanding officer's meetings, there were also biweekly meetings with lieutenants and supervisors of the command. Banks stated that the Respondent's minutes were better "by far" than the minutes of the person responsible for taking them. Banks further stated: "Basically I said I have to watch what I say around this guy. He recorded everything down to the I's and T's."

Banks stated that the Respondent "used to do a lot." When there was a new lieutenant assigned to the command, the Respondent would take that person "under his wing" and tried to tutor that person as much as he could. Banks stated that he remembered questioning the Respondent about it one time. The Respondent said that "the work that I am doing here is going to, in some form or fashion, cross paths with that person's line of responsibility, whether that person is the first platoon commander, coordinator, so it serves mine, theirs and the command's best interest, that I will help him as much as I can." Banks further stated that although he had a lot of lieutenants working for him, the Respondent was the one who always seemed to help the new supervisors. According to Banks, the Respondent built up a nice allegiance with the other supervisors and always seemed to take the time, no matter where they worked or even if they were not under his direct responsibility. Banks stated: "If you spoke to the supervisors that work for [the Respondent] or his peers, the one thing that they would have to say is that

the amount of assistance that he gave them was – Tony was a guy that was probably born, the first word he said was probably police. I was always very, very appreciative of that."

When asked about the Respondent's reputation for thoroughness, Banks stated that the Respondent could be "very, very anal . . . much to the chagrin of his peers." He related: "The assignments we used to give and they would come back, often it would pale, to the point like Tony, why are you doing so much, we didn't ask for that." Banks stated that it could be redundant because the Respondent used to be a "little bit excessive" with it. He noted that the Respondent was very, very thorough and thorough oriented.

On cross-examination, Banks stated that the only thing he could recall about being with the Respondent outside of work was that every Christmas he used to take all the lieutenants out to lunch. He stated that he took the Respondent out at least once, possibly twice, as a way of thanking the lieutenants. It wasn't "one-on-one;" rather, there were six lieutenants and an administrative associate. It was Banks' way of thanking them. Other than that, Banks stated that he has never been at any type of job or personal function with the Respondent.

Banks noted that he does not currently supervise the Respondent. The last time Banks supervised him was in January 2007, when Banks was a deputy chief and was removed from the 79 Precinct. He agreed that he is here on the Respondent's behalf. When asked, "You don't want to see him found guilty in this particular instance?" Banks responded, "If he is guilty, then he should be found guilty. If he is not guilty, then he should be found not guilty. I don't have any preference as far as that's concerned." When asked if he was aware of the charges against the Respondent, Banks stated that he

didn't know how specific he was aware, but he did know "that he has some issues as it originates with DCAS." Banks was then shown a copy of the charges and specifications against the Respondent. Banks indicated that, based on the ten seconds of what he just read, he would not change any of the answers he gave during direct examination with regard to the Respondent's character.

Banks agreed that the Respondent has a reputation for thoroughness. He recalled an instance where he said something and the Respondent brought back minutes that he had taken from that meeting. When asked how Banks found the Respondent's ability to follow direction, Banks replied: "I have never had a case personally, nor was aware of a case where any of my executive officers, that he ever had questions on." He stated that his three executive officers never brought to his attention a situation where the Respondent would have had to be questioned. He stated: "Me in the definitive, they never brought it to my attention. For the most part, Lieutenant Raganella was our go to guy when we needed things to be taken care of."

Banks was then asked by the Court if that meant that when Banks asked the Respondent to do something, he did it. Banks explained that the Respondent did it as thoroughly as "if you were doing it yourself." He stated that the Respondent is a "pretty remarkable guy."

Upon further cross-examination, Banks explained that what he meant by saying that the Respondent was "thorough to a fault" was that the Respondent often did more than what he was asked. When given a task, he seemed to do more than what was required. When asked if he was aware of an incident where the Respondent was given a direction, was unsure of what the direction was, and then requested further information,

Banks stated that he was sure there was but he could not give "specifics off the top of [his] head." He was sure that the Respondent had come to him and said, "I need to be sure about what you were asking for." Although Banks could not point to a particular situation, he stated that before the Respondent started doing and completing a task, he was the kind of person who wanted to make sure he understood what was expected of him. He reiterated that he could not cite a particular date or topic, but he was sure that the Respondent came to him for clarification.

Lieutenant Anthony Raganella

The Respondent has been assigned to the Brooklyn North Task Force for approximately eight months. Prior to working in the task force, he had been assigned to the 79 Precinct as a lieutenant for approximately three years. His duties at the 79 Precinct involved being the platoon commander, in charge of 3 squads on the 4 to 12 tour. At the time, he worked under then-Inspector Philip Banks. The Respondent stated that he has been a lieutenant for almost five years, since November of 2003. On June 30, he will have been a member of the Department for 13 years. He stated that prior to his current charges, he has never been the subject of any charges and specifications by the Department nor has he ever been the subject of any formal disciplines, suspensions, loss of vacation days, or "anything along those lines."

The Respondent stated that on May 20, 2006, he took a promotional examination for the position of captain in the Department. On the fifth Monday after the examination was given, DCAS published a proposed answer key for the exam. The Respondent stated

that based on that published proposed answer key, his raw score was 85, meaning that out of a hundred questions, he got 85 percent of them correct.

The Respondent stated that within one week after taking the exam, he applied for the protest review session by mailing a form to DCAS. He noted that in response to his submission, he received notification from DCAS to attend the protest review session, which was to be held at 26 Washington Street in lower Manhattan at their testing facility. The Respondent stated that he attended the session on June 21, 2006 at that location.

The Respondent stated that before he went, he was not aware of which questions he was going to protest until he had a chance to review them. However, after he got there and reviewed the 15 questions that he had gotten wrong, he chose to protest three questions. He stated that he chose those three because he believed that the answers he chose were "as good or better" than the correct answers in the DCAS proposed answer key.

The Respondent noted that he has previously taken exams for promotion to sergeant and lieutenant. He did not attend the protest session for the sergeant's exam because he only had three questions wrong, which he knew were wrong. However, for the lieutenant's exam, he did go to the protest review session and protested one question.

The Respondent stated that at the protest review session on June 21, 2006, the instructions given to candidates were that you could either "do the protest there during your 6 hour window of the session or you could go home and submit the protest through the mail within thirty days." He stated that other than what was written in those instructions, he was not verbally given any instructions about completing the protest while at the protest review session.

The Respondent acknowledged that DX 3 is the cover sheet, the instructions to candidates, and that these were, in fact, the instructions he received on June 21, 2006. He noted that he did not receive any other instructions different than DX 3.

The Respondent stated that if he opted to protest there at the site, he would be required to prepare three protests on a piece of carbonized paper in his own handwriting. If he chose to protest from home, he would have approximately 30 days to formulate his protest. He admitted: "based upon my penchant for thoroughness, I decided to go home and prepare an educated protest taking the thirty days that I had with which to prepare the protest, not to mention my handwriting is very sloppy and I didn't think that they would understand it anyway."

The Respondent stated that with regard to the instructions he was given (DX 3), his attention was drawn to statement No. 7: how to prepare the protest, preparing the protest, and directions on how to go about preparing the protest. According to the Respondent, statement No. 7 states that on the protest, you are to state the question number on the left side of the paper margin and then you are to state the question and formulate an argument as to why the answer you chose is as good or better than the key answer and to include any documentation that you wish to substantiate your protest with.

The Respondent explained that, to him, "state the question" meant to "reiterate the question verbatim word-for-word the way it appears." The Respondent acknowledged that it clearly states at the top of the instructions that you are not to remove any of the DCAS material. However, later in paragraph 7, the instructions say that you are to state the question when you prepare your protest. The Respondent interpreted this as a distinct conflict in the instructions: that you could not take the question with you when you

leave, yet if you choose to protest from home you have to state the question. The Respondent further stated: "I saw that as a conflict then. I still see it as a conflict now." The Respondent said that his whole purpose for being there that day was to see if there were any questions that he was going to protest; therefore, his attention was drawn to paragraph 7 on how to prepare the protest. In order for his protest to be considered by DCAS, the Respondent felt that it was important for him to comply with the proper preparation of the protest. He explained that to be in compliance with the instructions that were given to him was "exactly what it said in paragraph 7 which were to state the question."

The Respondent stated that when you arrive at the protest review session and enter the room, you are given a test booklet, which is a copy of the test booklet that was used on test day. You are also given scrap paper, instructions to candidates, and any reference materials that were used during the test itself. He stated that at the end of the protest review session, all of the materials that DCAS gave to him were given back to DCAS, "as it states in the instruction." He "absolutely" admitted that the instructions said that you could not remove any of those materials from the review session.

The Respondent stated that to verify and reconcile the instructions that you are not to remove any notes or materials with the instruction to state the question, he asked the proctor in the room to come over to his table. The Respondent further stated that he specifically pointed out paragraph 7 in the instruction to candidates and he asked her if these were the instructions they were to follow whether they chose to do the protest there or take it home. He stated: "She said yes, that's the way you do it for both."

The Respondent stated that at that point, it was clear in his mind, more clear than it had been prior to asking the proctor that he needed to state the question in his protest when he went home. At that point, he opened one of the reference books he brought in (he did not remember if it was the Patrol Guide or administrative guide), wrote the questions verbatim, "exactly the way it appeared," and brought them home for the purpose of formulating his protest and sending it back to DCAS. When asked if he had an opinion as to whether it was okay to write the questions out to formulate a protest, the Respondent replied: "I absolutely believed that that's what needed to be done."

The Respondent stated that while he was at the protest review session, he believed that there were six or seven other lieutenants in the room and they were talking to each other about the protest, helping each other out. When asked if the individuals who stayed to do their protests were actually writing the questions out on their protests, the Respondent replied: "I have no knowledge as to what they may have written or didn't write." The Respondent agreed that it was his belief that it was perfectly okay to take the questions home for him to formulate the protest review session. When asked what his intention was in copying the questions verbatim to take home with him, the Respondent responded: "Nothing other than to prepare my protest."

The Respondent agreed that he did, in fact, prepare his protest. It took him "a good three and a half weeks" to prepare the three protests and to mail them to DCAS with certified mail return receipt requested on July 17, 2006, which he believed was two days before the end of the protest session. He agreed that in the protest submitted to DCAS, he did, in fact, write down the questions word-for-word verbatim "just as they instructed to do."

The Respondent agreed that he was aware of ExamX.com, which he described as a "scholarly type of website and discussion board for people that are taking NYPD promotional exams." He believed that the website has been around since he started studying for the lieutenant's exam. He stated that he probably went on that website for the first time in 2002 or 2003, for the lieutenant's exam. He agreed that he went on the website for the captain's exam that he took in May 2006.

The Respondent stated that he went on the website on numerous occasions to "peruse what was on it as far as an actual posting on the website." He believed that he posted a copy of his protest on that website on or around July 20. He acknowledged that he actually posted his protest on the website on July 20, 2006. When asked if there were other postings by lieutenants who had taken the captain's exams, he replied that there were "scores" of people and postings that were relevant to the May 2006 captain's exam on the website. Postings included discussions about the upcoming exam, before the "add" exam was administered. After the exam, there were numerous discussions about what questions they believed were "defective" and potential protest questions. He agreed that these were other lieutenants who had taken the same captain's exam that the Respondent had taken.

When asked why he posted his protest on the ExamX website on July 20, 2006, the Respondent explained that "for lack of a better term, there is a psychological phenomenon" where, before taking a promotional exam in the NYPD or "anywhere else for that matter," you are studying for six months and sacrificing your own time to study for the promotion, and you are "challenging" other people taking the exam against you. Since you are competing against these people who are taking the exam, you are almost

"archenemies" with them. You do not want to share information with them, since this might give them a "leg up" on the examination. However, once the exam is over, which was May 20, you are "best buddies" with that person that you did not want to know before the examination.

The Respondent stated that he believed that posting on the website would be no different than him discussing the exam with one of his friends. As far as he knew, there have not been and still are no prohibitions against posting on the website. He indicated that at the time that he posted, July 20, 2006, he was not aware of any regulations or prohibitions against posting the protest review on the website. He acknowledged that he had already submitted his protest to DCAS at that point in time, July 20, 2006. He stated that to his knowledge, the protest review session ended on July 19 and he posted on the website July 20, 2006, so he stated: "There were no contradictions to me posting on there. It was of nobody's benefit posting anything that I had on that website at that time." The Respondent noted that neither at that time nor at the time that he posted it on the website did he have any knowledge or indication that there was going to be any further make up exams for this particular captain's test.

The Respondent indicated that on August 3, he had a telephone conversation with Matthew Befort from DOI. He explained that he was on his way to a vacation upstate when he received a phone call from his sister informing him that an investigator from DOI called and the Respondent needed to return the phone call. On his way upstate, he called the investigator from his cell phone to find out what he wanted. The Respondent indicated that prior to calling him back, he believed that it was job-related, possibly about

an arrest that he had or some type of police action that he had taken where clarification was needed.

The Respondent stated that when he called the investigator back, the investigator said that he needed to speak with the Respondent about the protest he submitted to DCAS for the captain's exam. The Respondent asked if he could talk to the investigator over the phone but the investigator preferred speaking to him in person, either by the Respondent coming to his office or him coming out to the Respondent's precinct. The Respondent told the investigator that he was on vacation and asked if there was a time constraint as to when he needed to see the Respondent. The investigator told him that it was at his convenience. Since the Respondent was going to be back Monday, August 7, he set up the meeting for Tuesday, August 8.

The Respondent confirmed that he went to the DOI offices on August 8, 2006. He stated that he met with Matthew Befort and two other investigators. He elaborated that he responded to the DOI office at 80 Maiden Lane, where he presented himself to Befort. At that time, Befort came out and introduced himself. He then asked the Respondent to go with him to a conference room located across the street, where there were two other men, whom the Respondent learned were investigators. At that conference room, they sat down and the Respondent asked Befort "what this was all about." The Respondent stated: "[W]e had an off-the-record conversation regarding what he was there for and why they called me in." The Respondent stated that off the record, Befort told him that the reason he was called in at the request of DCAS, who were "alarmed" that the Respondent had verbatim questions in his protest review. DCAS requested that DOI be fact finders to "find out how [the Respondent] was able to come

across the questions word-for-word verbatim . . . and give their information of what they found back to DCAS."

The Respondent stated that he was never specifically informed by Befort that DOI had an investigation open on him and that, in fact, when he spoke with Befort on the phone he was never informed that there was any investigation going on. To the Respondent's knowledge, he was going down there for an informal interview relating to questions that Befort had with the protest. He was never informed to bring any representation or counsel, or told that he needed to do that, or that that was available to him at that time. He indicated that he did not bring any representation or anyone with him when he responded to the DOI offices on August 8, 2006 because he did not feel that he needed it. He stated that he did not know what it was about at that time, but when he did find out what it was about and they were going to swear him in and record the interview, he decided to check with counsel at that time. He indicated that he did check with counsel at that time, but that it did not change his decision to submit to questioning at that point. He indicated that he did, in fact, submit to questioning at that point in time but he was not "Mirandized" or read any rights with regard to his statement to them. He denied that at that point he was told specifically that he was alleged to have violated any specific provision, whether it was Civil Service Law, DCAS rule or regulation.

The Respondent stated that after submitting to the interview, Befort told him that they were not the ones who were going to make any decisions regarding what DCAS was investigating. He stated: "I was led to believe that DCAS was conducting an investigation into alleged violations relating to me submitting my protest with verbatim questions and that DCAS was the one that was going to make any determinations as to

my eligibility on the list or anything else." He further stated that DOI was a fact finder at that point, giving DCAS facts that they found from him.

The Respondent indicated that up to August 8, 2006, he had not received any notification that he allegedly violated Civil Service Law. Nor did he receive any notification up to that point of time that he allegedly violated DCAS rules and regulations. He stated that it was early December when he received a Notice of Allegation from DCAS.

The Respondent indicated that from August 8, 2006 up until the time the IAB investigation started in this matter, he did not cause any notification to be made to IAB. The Respondent explained: "Under the provisions of the Patrol Guide 207-21, I believed, after consultation with counsel, my conduct relating to what happened between me and DCAS never rose to the level of corruption, serious misconduct or any misconduct for that matter." He believed that this was an administrative matter between him and DCAS, and since he did not believe that this was corruption, he did not have any reason to make notifications to anybody relating to this matter.

The Respondent agreed that on December 8, 2006, he received an official notification that he was the subject of actual allegations. He stated that by the time he received that letter, IAB had already started an investigation. He believed that he received the Notice of Allegation dated December 8 on December 12 through the mail. He indicated that he submitted a response (RX A) to DCAS, specifically Assistant Commissioner Tom Patitucci. In his response, he detailed for Commissioner Patitucci why he believed he did not violate Civil Service Law and DCAS rules and regulations. He indicated that after submitting his response to the Notice of Allegation, DCAS

contacted him and told him that his exam score was going to be nullified and he was going to be disqualified from the eligible list for the captain's examination.

The Respondent indicated that he did challenge the notification by submitting an Article 78 proceeding in Supreme Court. He stated that it is currently waiting to be decided.

When asked what effect the disqualification from DCAS has had on him, the Respondent stated that he had spent six months "sacrificing family, friends and relatives" in order to study for the exam and he has dedicated his career toward getting promoted in this Department. After DCAS' determination, he has been passed over for promotion seven times. He has lost a year and a half in seniority and about $40,000 in pay. According to the Respondent, he would have been promoted in the first group since he was number 13 on the eligible list, if it were not for the charges and specifications that he had been given and DCAS' actions against him. He agreed that as a result of DCAS' decision, it was his understanding that he will never be promoted off of this list even though he scored number 13 on the exam.

On further direct examination, when asked if there was anything else he wanted to address to the court at that time, the Respondent stated: "[A]t no time do I believe that anything that I have done was deceitful or underhanded." He believed that everything he did was in compliance with their instructions. He stated that he has dedicated the past 13 years of his life to this Department and he wanted "nothing to do but to move up the ranks and effect positive change in this Department." Therefore, he never would have done anything that would jeopardize his career standing, especially with regard to being promoted and moving up the ranks in this Department. He further stated: "I certainly

don't believe that anything I have done here would put me in light of conduct prejudicial to the good order of the Department. That was never my intention and I don't believe that that was the result of what I did."

On cross-examination, the Respondent agreed that he copied the questions and answers verbatim from the protest session into his Patrol Guide or some other material that he had brought into the exam and that he removed those from the exam center. He also agreed that he posted his protest, which contained verbatim questions and answers from the captain's exam, on a publicly accessible website. When asked if at any point he ever alerted the Department that he was questioned by DOI or that there potentially may have been an investigation against him with regard to DOI, he responded: "Absolutely not."

After being shown DX 2 or 2A, the Respondent agreed that he remembered receiving the letter and that he had read it. He also agreed that on the bottom of the letter, there is a typed protest review unit with a phone number. He agreed that the middle paragraph of the letter gives instructions as to what you can and cannot do at the protest session. The Respondent was then asked to read the following sentence in the middle of that paragraph aloud: "However, in no case will you be allowed to remove from our premises any materials relating to the test or any notes which you may make during the review." The Respondent believed that when he received the letter, that part was highlighted. He stated that he had read that sentence when he arrived and that he believed he signed a copy of that letter.

When shown DX 3, the Respondent agreed that he was provided that cover sheet on the day of the protest and that this was instructions for him at the protest. He stated

that he "absolutely" read every instruction: the first instruction, the second instruction, the third one. When asked what the third instruction said, he read: "When you leave, you may not take with you any notes prepared during the protest review." He agreed that the word "not" was underlined. He agreed that instruction No. 4 deals with Section 50.11 (d) of the New York Civil Service Law, which explains that if you are in possession of any answers or questions, unless authorized, it is punishable to a Class A misdemeanor. He acknowledged that he had read that on the day of the protest. He also acknowledged that on the day of the protest, he read that you would be punishable to a sentence of imprisonment. He further acknowledged that on the day of the protest, he read that someone who violates that section shall be disqualified from appointment to the position for which the examination is being held and, in fact, may be disqualified from being a candidate for any civil service exam for five years. The Respondent then agreed that he moved on to No. 5 but when asked if he then moved on to No. 6, he replied: "I am not positive what I order I read the instructions in. I could tell you that I read all of the instructions."

The Respondent stated that he was provided with ruled, carbonized paper. He agreed at the bottom, in all caps underneath, it said to sign and print your name, and that there was another highlighted statement that said "Remember." When asked what it said after the highlighted section "Remember," the Respondent read: "You must turn in all of the examination material, your protest, your scrap paper, the proposed answer key and any notes you may have prepared." The Respondent agreed that he had read that at some point in time.

The Respondent stated that he was at the protest session for approximately two hours. He agreed that when he decided not to do the protest at that time, he returned the material to the administrators, including the ruled paper, scrap paper, and test booklet. He stated: "Anything that DCAS gave me, that was theirs, they got back . . . ." When asked if he returned the proposed answer key, he responded that he did not because that was his copy. When asked if before turning in the materials, he noted or copied in a book the verbatim questions and answers for three questions, the Respondent stated that he wrote them out and agreed that he had put them on paper in his book.

During further cross-examination, the Respondent was asked to point out the word "verbatim" in the cover sheet, but the Respondent's counsel stipulated that the word "verbatim" does not appear in DX 3. When asked if "verbatim" was his word or it was what he thought, the Respondent replied: "If you are asking me if the instruction sheet says the word 'verbatim,' I would say no, it doesn't say verbatim." When asked if it was he himself who put the word "verbatim" in his mind as to the instructions of what he had to do, he responded: "I was using a dictionary term of what the word 'state' meant." He agreed that it was his interpretation that it required a verbatim statement.

The Respondent agreed that at some point in time, he asked a monitor to come over. He disagreed that it was to ask if the rules were the same in a mail-in protest as opposed to an in-house protest. Rather, it was to ask specifically about paragraph No. 7, and not the rest of the instructions. He agreed that he specifically asked if the rule in paragraph No. 7 applied for the mail-in. He denied asking the person if he could take the verbatim questions and answers home and then writing that in his mail-in protest. When asked if he asked to see a supervisor to explain exactly what No. 7 meant when he left the

room, he stated that he asked the proctor. He indicated that other than the proctor, he did not ask anybody else when he left that room. He also indicated that when he got home, he did not call DCAS or the protest review unit to ask them any questions.

The Respondent agreed that he took the lieutenant's exam and that he had protested a portion of that exam. When asked, "Did you take verbatim questions and answers out of the lieutenant's exam?" he responded, "Yes, I did." He indicated that it was on question No. 59 of the lieutenant's exam that he had taken the verbatim question and answer. He agreed that he wrote down verbatim the question and answer and removed them from the protest section.

When asked by the Court how long ago the lieutenant's exam was, the Respondent replied that he believed it was in February 2003. The Court then asked what question No. 59 was about. The Respondent explained that it was related to two answers as to whether a juvenile caught on school grounds with a firearm can either be questioned without the representation of parents or be transported in a patrol wagon with adults. He indicated to the Court that as a result of his protest, the question was overturned and it became a double answer.

Upon further cross-examination, the Respondent agreed that he was contacted by DOI, initially through a phone call. He agreed that during that initial phone call, details about what was the issue were not really disclosed to him. It was not until August 8, when he voluntarily appeared for the interview with DOI, that what was going on was explained in full detail to him. He indicated that at that point in time, he did not think that an investigation by DOI was going on. He agreed that DOI offered him an

opportunity to call someone, but it was at his request. He stated that he called James Moschella, an attorney.

The Respondent indicated that at the end of the interview with DOI, he still did not feel that an investigation by DOI was ongoing; however, he did believe then that an investigation was ongoing with DCAS. When asked if the investigation was due to his removal of questions and answers from the protest questions, he responded that they did not know that at that time until he had told them that that was what happened. He stated: "DCAS wanted to find out through DOI, who were the fact finders, how it was proposed to me, how I was able to come across the questions verbatim, word-for-word." The Respondent agreed that he voluntarily told them that he took the answers verbatim out of the protest session, just as he voluntarily told them that he posted it on the Internet website.

When asked if he remembered that possession of the answers and questions were considered a class A misdemeanor, the Respondent replied that he had read that in the instructions. However, he did not remember that it was a class A misdemeanor at the time that DOI interviewed him but he agreed that at some point he did know.

The Respondent agreed that he became aware that an additional make-up exam was administered by DCAS with regard to the captain's exam after he protested his questions. He stated: "Subsequent to DOI's interview and subsequent to DCAS' investigation, I became aware that they gave a subsequent military exam to two people on September 8th, I believe it was." He agreed that this was after he had posted the verbatim questions and answers on the website. He stated that he believed that the protest that he posted on July 20 remained on the website for approximately three weeks before the

website crashed and they lost all their information. He believed that this was prior to the administration of the other exam.

When asked by the Court when he had posted the protest and how long it was up for, the Respondent replied that he believed it was on July 20, 2006 and it was up for three weeks. When asked if it stopped appearing after that, the Respondent stated that he believed so.

On further cross-examination, the Respondent agreed that he had read the Patrol Guide with regard to his duty to report corruption against himself. He stated that he had done that "[p]robably a couple hundred times during the course of [his] career." When asked if he had read it again specifically when these allegations started coming out against him, he stated that he believed that he had read them again after he received charges and specifications that alleged that he violated Sections 207-21 and 212-09. He also stated that he had read them again this morning.

When asked, the Respondent stated that he first spoke to his attorney, James Moschella, on August 8 when he was at DOI's office and he had a telephone discussion with him as to what was transpiring and whether that necessitated a notification to the Department. The Respondent stated: "Myself and James Moschella, after discussing what the content of DOI's interview was going to be, we both agreed that it didn't rise to the level of corruption or misconduct." When asked, "So you made an interpretation on that as well; correct?" he responded, "Absolutely."

When asked if an investigation surrounding an accusation of a misdemeanor would fall under the requirement of reporting the misconduct to the Department, the Respondent stated that he needed counsel to be more specific with the facts and he could

not make a blanket statement. When asked, the Respondent said: "I believe if one of my subordinates came to me and told me that he was charged with a misdemeanor, yes, I would say that would necessitate a notification to Internal Affairs." Counsel then asked, "If somebody said: 'Lieutenant, the Nassau County Police Department asked me to come in to talk about a misdemeanor that I may or may not have committed, should I report that to Internal Affairs, would you instruct that individual to report that to Internal Affairs." To which the Respondent replied, "Again, it would have to be based on specific facts of the case."

On re-direct examination, the Respondent indicated that when he went to DOI on August 8, 2006, he was not informed by any investigator that he was being investigated for a possible violation of a misdemeanor of the Penal Law. He stated that he spoke with Matthew Befort directly and he was told by Befort that "DOI was not making any determinations as to what was going to happen to [him], it was strictly up to DCAS." He further stated that DOI was on a fact finding mission as to how the Respondent was able to obtain the question verbatim and send it back to DCAS, who would make a determination as to his eligibility on the list.

When asked if prior to receiving the Notice of Allegation on December 8, 2006, anyone from DCAS or DOI told him that his conduct specifically was under investigation for a violation of a Civil Service Law or DCAS' rules or regulations, the Respondent answered, "No." He stated that, as a matter of fact, he had made phone call inquiries to DOI subsequent to August 8 to find out what was going on with their fact finding mission. At that time, he was told by Befort and his supervisor, Stacy Bethel, that "their

interview with [him] was done and they sent everything back to DCAS, it's out of their hands, it's up to DCAS what's going to happen at that point."

The Respondent indicated that he believed that during the whole period of August, September, and October, the Department was involved in the decision-making or was aware of what was happening with their own captain's exam. He stated: "I know that Department of City-Wide Administrative Services liaisons with the Department of Personnel, the Chief of Personnel on this job, it's an NYPD promotion exam, to me it was obvious that they knew what was going on."

With regard to paragraph 4 of DX 3, which states that "A person who shall have in his or her possession any questions or answers relating to any such examination or copies of any such questions or answers, unless such possession is duly authorized by the appropriate authorities," the Respondent stated that he believed that Paragraph 7 authorized him to state the question in his protest and he still has that belief. He indicated that he did not have any confusion on June 21, 2006 as to paragraph 7 and its instructions to state the question. When asked specifically what his question to the proctor was on that date, he replied: "Just to reiterate and clarify that paragraph 7, where it says, 'State the question,' also applies to if we do the protest at home."

The Respondent reiterated that he did not ask the proctor whether it was okay to leave with a copy of the question because "at the time that she told [him] that 'State the question' applies to doing the protest from home, also, it was crystal clear in [his] mind that in order to prepare the protest and have it considered you need to state the question as it says in paragraph 7."

The Respondent stated that, with regard to question No. 59 on the lieutenant's exam, he wrote the question "word-for-word, including grammar errors" and submitted it to DCAS. He indicated that subsequent to that protest he was not ever contacted by anyone in DCAS or DOI to let him know that that was somehow wrong.

During re-cross examination, when asked if he ever got anything in writing that gave him authorization to remove the questions verbatim from the protest session, the Respondent replied: "My interpretation of paragraph 7, yes." When further asked, "My question was: Did you receive anything in writing from any authorized person giving you the authorization to remove the questions verbatim out of the protest session?" he responded, "Again, paragraph No. 7, yes." When asked by the Court if he got anything else in addition to paragraph 7, he replied, "no."

When asked by the Court if he had an Article 78 pending regarding the DCAS decision, the Respondent replied: "That's correct." The Court then asked if that decision was awaiting the decision in this matter or is it was just pending. To which the Respondent stated that his counsel, Jim Brown, could better answer that question. Mr. Brown stated: "It's my understanding it's still pending. It's not dependent upon the outcome of this proceeding."

FINDINGS AND ANALYSIS

There is no question that the unique personality of the Respondent lays at the heart of this case. There is ample evidence in the record to indicate that he is an outstanding police officer and supervisor. There is also ample evidence that he is punctilious, perhaps punctilious to a fault.

Specification No. 1 reflects, in substance, Civil Service Law § 50 (11) (d). The Respondent has raised a defense to this section that might well be viewed as non-frivolous. He claimed that he believed that the instruction to "state the question" required him to write out the entire question verbatim and the only way to do that and pursue his option to complete the protest at home was to copy the question. Patitucci testified that it was not necessary to state the question verbatim but that dealing with the issue in the protest room might be different than dealing with the issue in a protest prepared at home. This distinction did not appear anywhere in the instructions. Moreover, the questions on the captain's examination are complex and without the detail provided by the exact language of the question the protest response might be rendered meaningless (see DX 4).

That defense was raised before DCAS and was rejected. An appeal of the DCAS ruling is now pending in New York State Supreme Court pursuant to an Article 78 appeal.

The Respondent has argued through counsel that this Court should be guided by several decisions of the Office of Administrative Trials and Hearings (OATH) which has declined to hear disciplinary cases involving violations of Civil Service Law § 50 (see OATH decisions 321/82 and 258/05). Essentially Respondent argues that OATH has recognized that Civil Service Law § 50 provides unique power to DCAS in relation to civil service matters and it also provides unique penalties and that this bars disciplinary action in this forum.

The OATH cases are distinguishable on both the facts and the law. Both cases involve alleged falsehoods on civil service applications and address issues covered under

subdivision 4 of Civil Service Law § 50 and not subdivision 11 as in the case before this Court. This is a significant distinction.

The OATH cases rely on the Court of Appeals decision in Giangiacomo v. Village of Liberty, 40 N.Y.2d 957 (1976) which also deals with a false statement on an employment application. In that case, as in the OATH cases, charges were brought under Civil Service Law § 75 to circumvent the three-year time limit set in Civil Service Law § 50 (4). The Giangiacomo decision addresses an issue that squarely falls within subdivision 4 and specifically refers to that subdivision. It makes no pronouncement regarding any other subdivision of section 50.

Further the Appellate Division ruling upheld in Giangiacomo noted that disciplinary action under Section 75 can only be brought for "incompetence or misconduct" and alludes to the fact that Giangiacomo's misconduct well preceded his employment.

The case before this Court relates to conduct which occurred recently and during the course of the Respondent's employment with this Department. Moreover this tribunal, as it relates to uniformed members of the service, does not function under Civil Service Law § 75 but under Administrative Code § 14-115. That distinction reflects the unique nature of this Department. Administrative Code §14-115 subdivision (a) encompasses a greater range of conduct including "conduct unbecoming an officer." Consequently it would appear that this Department has authority to take disciplinary action regarding the charges presented in Specification No. 1.

In determining how to handle this charge, there is a more compelling practical problem that requires consideration. A ruling on Specification No. 1 would require this

Court to review and rule on the reasonableness of the policies, practices and procedures of another city agency; DCAS. This is something that should be avoided. This Court and indeed this Department should not put itself in the position of ruling on the conduct of another New York City agency. That is particularly true in this case where the matter is pending in state court which will be hearing the Article 78 appeal. Further DCAS has imposed, subject to that appeal, a significant penalty for this violation. Consequently, I recommend that Specification No. 1 be dismissed.[1]

Specification No. 2 relates in some measure to the conduct prohibited in Civil Service Law § 50 (11) (g) but it in fact addresses a different issue. Subdivision (g) prohibits the disclosure or the transmission "to any person [of] the question or answers to such examination prior to its administration." The DCAS letter found that the Respondent had violated this section of the law in addition to subdivision (d). The Respondent in his reply letter has raised a defense to this charge stating that there is no evidence that the individuals who took the make-up examination ever saw his posting on the internet site. This argument goes to the issue of whether there was actual disclosure or transmission, "to any person."

The conduct charged under Specification No. 2 relates to the posting of the questions and answers on a publicly accessible internet site, whether or not anyone saw it (besides, of course, the people who saw it in connection with this case). Moreover, addressing the issue raised in Specification No. 2 does not call upon this Court to review

[1] Some insight into the Respondent's personality and the potential complexities of his Article 78 appeal can be seen by reading question 58 and his protest to it as recorded in DX 4. The question involves a complex fact pattern and offers four choices to a duty captain responding to the scene. Each answer contains an explanation for the proposed action, some with subtle distinctions. The question and multiple choice answers are at least a typewritten page long. The Respondent's detailed protest would probably cover more than ten typewritten pages. In it he makes a series of well researched and well documented arguments as to why his answer is as good as and possibly better than the answer deemed correct by DCAS.

the actions of another city agency, something this Court has concluded it should not do, but instead focuses on the actions of the Respondent.

In regard to this specification the Respondent's legalistic formulations fail him. In his response to DCAS (RX A) and in his testimony at trial the Respondent said that the reason he copied the questions verbatim and took them from the examination room was because he saw a conflict between paragraphs 4 and 7 of the instructions. He determined, in essence, the requirement of paragraph 7, that he "state" the question, overrode the requirements of paragraph 4 that nothing be removed from the room.

If that interpretation was correct then there was a single, limited, purpose for removing the question. The Respondent offered no legal or even legalistic explanation for his action in posting the questions on the internet. At trial he described the conduct as a "psychological phenomenon" based on his *belief* that the test was no longer in use after the protest session. Having made that "factual" determination he went on to make a "legal" determination that he could continue to possess the questions and do with them as he pleased. He apparently did not check with anyone and made these determinations on his own.

Not only did he have no authority or basis for doing this but he was factually wrong as the test was still in use. Moreover there was no conflict to be resolved as in the dilemma he said he faced in dealing with the inconsistent instructions he found in paragraphs 4 and 7. The decision to post the questions and answers on the ExamX website was a matter of pure discretion on his part and not mandated by anything more than his ego.

One of the fundamental principals of the mission of this Department is that members of the service do not make the law, they follow it. For that reason the Respondent's conduct is of concern to this Department as it directly bears on good order, efficiency and discipline. Additionally his conduct had a direct effect on other members of this Department who later took the test with three fewer questions.

Consequently the Respondent is found guilty of Specification No. 2.

Specification No. 3 deals with his alleged failure to notify the Department about the allegations against him. It is instructive to note that three versions of this specification have been presented to the Court, an original and two amendments, each of which had a different date of alleged occurrence. The original charges carried a date of June 21, 2006, the day the Respondent walked out of the protest room with the questions. Clearly that could not be the date he failed to notify the Department because, he did not believe he had done anything wrong and no one had told him he was accused of doing something wrong.

The next date was December 8, 2006, which is the date on the letter sent by DCAS notifying him of the violation. While the record is not completely clear on this, it appears that by that date the Respondent had been notified by IAB of their investigation which had commenced in October.

The final charges and the ones actually before this Court list the date of the failure to notify as August 8, 2006, the day he was interviewed at DOI. Respondent claims that on that day he understood that DOI was simply conducting a fact finding for DCAS which was trying to determine how he was able to recite the questions verbatim in his protest.

The Patrol Guide section in place at that time was 207-21. It has since been replaced by a more encompassing section embodied in Interim Order No. 9, issued April 7, 2008.

There are two possible applications of PG 207-21 to this case. One deals with an allegation against the officer him or herself. It provided in relevant part that: "a member of the service receiving an allegation of corruption against oneself will request a supervising officer to respond to the scene." The allegation against this Respondent is that he broke a rule in connection with a civil service examination. There is no allegation of corruption against this Respondent.

PG 207-21 also required a member of the service to report criminal activity or serious misconduct of any kind by a member of the service whether on or off duty. The Assistant Department Advocate has argued that a violation of any subdivision of Civil Service Law § 50 is a misdemeanor and would constitute serious misconduct that had to be reported. But based on the testimony, there was no reason on August 8, 2006 for the Respondent to have believed that he was being investigated for any serious misconduct, let alone a misdemeanor.

The Respondent believed he did nothing wrong. There is no indication that Befort told him that he was the subject of an investigation into serious misconduct or a violation of law and at one point Befort even agreed that the rules might be subject to interpretation. What the Respondent reasonably believed was going on, was an administrative fact finding effort, with which he fully cooperated.

The Respondent is also charged under Specification No. 3 with a violation of Patrol Guide § 212-09. Charging this subdivision demonstrates what a stretch Specification No. 3 is.

PG 212-09 relates to the prompt notification of the Chief of Patrol of an unusual occurrence which is defined as substantially more than an ordinary occurrence. The definition goes to speak of "seriousness," "particularities," "sensationalism," "vastness," "differences," "newsworthiness," the "potential to affect police-community relations involving interracial/ethnic conflict or community unrest." The section requires immediate notification of the desk officer and the response of the patrol supervisor.

It would appear that the situation this Respondent found himself in at DOI on August 8, 2006 was not what PG 212-09 was intended to encompass.

The Respondent is found Not Guilty of Specification No. 3.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on June 30, 1995. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found guilty of one specification in this case. From the testimony of Deputy Chief Banks at trial as well as other documents submitted by the Respondent it is clear that he has been a genuine asset to this Department. It is also clear

that had he not protested any questions he would likely have been promoted to captain by now. Clearly the Respondent has already sustained a very substantial penalty.

If the Administrative Code provided for a dismissal of charges in the interest of justice it is certainly something that would have to be seriously considered in this case. But it does not.

If anything positive is to come out of this unfortunate situation it would be for the Respondent to come away with a life lesson: that his considerable energy, intelligence and attention to detail is a gift but one that has the potential to cause harm, in this case harm to himself, when it is not properly restrained. I do not believe the loss of eight vacation days recommended by the Assistant Department Advocate will further that goal. I do believe that a reprimand, an authorized penalty under the Administrative Code, has the potential to convey the Department's respect for the work he has done and the hope that he will be able to fully utilize his talents in the future. Consequently I recommend that the penalty in this case be a reprimand.

Respectfully submitted,

Martin G. Karopkin
Deputy Commissioner-Trials

APPROVED
DEC 18 2008
RAYMOND W. KELLY
POLICE COMMISSIONER